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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 571

J. W. CRANK, TEXAS & PACIFIC RAILWAY COMPANY AND OTHER LANDOWNERS IN THE McKINNEY BAYOU DRAINAGE DISTRICT OF MILLER COUNTY, ARKANSAS,
Petitioners,

vs.

J. RIPLEY GREER, TRUSTEE AND W. R. STEVENS INVESTMENT COMPANY, INC., AND VANCE M. THOMPSON,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

NED STEWART,
Counsel for Petitioners J. W. Crank and other Landowners;
OTTO ATCHLEY,
ROBERT S. VANCE,
Counsel for Petitioner Landowner Texas & Pacific Railway Company.

BEN SHAVER,
PAUL JONES,
Of Counsel.

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Petitioners,

vs.

J. RIPLEY GREER, TRUSTEE AND W. R. STEVENS INVESTMENT COMPANY, INC., AND VANCE M. THOMPSON,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioners, J. W. Crank, Texas & Pacific Railway Company and other Landowners in the McKinney Bayou Drainage District of Miller County, Arkansas, pray that a writ of certiorari issue to review the judgment of the Arkansas Supreme Court, entered on the 22nd day of October, 1951, in appeal case No. Series 4-9565, entitled *J. Ripley Greer, Trustee, et al.* v. *Charles C. Wine, Receiver, and J. W. Crank, et al.*

Opinions Below

The instant proceeding involves two appeals from the same case. *J. Ripley Greer, Trustee, et al.* v. *C. M. Blocker,*

Receiver of McKinney Bayou Drainage District, et al., No. 9336, (R. 1) is reported in 218 Ark. 259, 236 S.W. 2d 68. *J. Ripley Greer, Trustee, et al.* v. *Charles C. Wine* (the substitute Receiver) *Receiver of McKinney Bayou Drainage District, et al.*, No. 9565, (R. 30) is reported in 243 S.W. 2d 13.

In as much as this Petition is concerned, as to the first opinion, solely with the order and direction of the court below and the findings of the court pertinent thereto, excerpts therefrom shall be confined to such order and findings.

After disposing of issues relating to the power to levy a further tax, the question of interest, and the statute of limitations, the court below found:

"The defendant Landowners adopted the Receiver's defenses and also presented these additional issues: . . . (3) That 6.65 per cent of the original assessed benefits is all that could possibly remain due on the asssessed benefits on any tract of land * * *. It is admitted by the pleadings of the Landowners, and clearly established by the evidence, that the total tax levied to date is an amount equal to 93.35 per cent of the assessed benefits; so unquestionably there remains an amount equal to 6.65 per cent of the assessed benefits, plus also interest in some amount on the assessed benefits. With its full faith and credit pledged, and with these assets remaining, the District cannot claim that its power to tax has been exhausted * * * Conclusion. There remains for consideration only issues No. 3 and No. 6 presented by the Landowners: these relate to the 6.65 per cent of uncollected benefits and disposition of the lands held by the Receiver; and they blend into the points already discussed. Since there are uncollected benefits and some interest thereon, the Chancery Court should direct the Receiver to apply to the County Court for an order of

collection; and the County Court may make the collection rate per annum at such figure or percentage and over such period of years as may be deemed wise and best * * *. The decree of the Chancery Court is reversed and the cause is remanded with directions to enter a decree and proceed in accordance with this opinion."

From a decree after mandate (R. 27), which was "almost verbatim and most certain literally, the explicit directions" (R. 36) of the Arkansas Supreme Court, the bondholders appealed—nine months after the time for rehearing, allowed by Rule 25 of the said Court, had elapsed.

As preface to abstracting the opinion on the second appeal, in *Greer* v. *Wine*, we state that we do not raise any issue with respect to the *merits* of the second opinion, our contention being, as stated in the dissenting opinion (R. 36), that "by every known rule of judicial construction the cited case (*Greer* v. *Blocker*) is the law of this case. *To rule otherwise would in effect allow a rehearing of the cited case nine months after the time for a rehearing has elapsed.*"

Pertinent excerpts from the majority and dissenting opinions on the second appeal follow:

A paragraph in the January opinion resulting in construction differences between the contending parties reads: "It is admitted by pleadings of the landowners, and clearly established by the evidence, that the total tax levied to date is an amount equal to 93.35% of the assessed benefits; so unquestionably there remains an amount equal to 6.65 of the assessed benefits, plus also interest in some amount on the assessed benefits."

It will be observed that the expression "an amount equal to" was twice used. But the contention is that we necessarily found that the payments were on benefit assessments

and that all but 6.65 had been exhausted, "plus some interest".

The error of this reasoning is emphasized by *Watson* v. *Drainage District*, 236 S.W. 2d 423, The Law Reporter for February 12, 1951. The *Watson* case was under submission when *Greer* v. *Blocker* was decided and the two appeals were discussed in parity.

In the Watson litigation the method of computation was made applicable to cases *where another procedure had not been adopted by the district.* Here there is nothing to indicate that the payments were percentages of the benefits to be so treated in derogation of the legally-approved formula, hence the collections fall into the interest classification as set out in the cited cases. This leaves the benefits intact.

Reversed, with directions to enter a decree that payments aggregating 93.35% were interest, and that the benefits have not been reached.

Mr. Justice George Rose Smith did not participate in the consideration or determination of this case.

Mr. Justice Millwee and Mr. Justice Ward dissent.

Jurisdiction

The judgment of the Arkansas Supreme Court was entered on October 22, 1951. A petition for rehearing (R. 32) was denied on November 26, 1951. (R. 36.) The jurisdiction of this Court is invoked under 28 U.S.C., section 1257 (3) (Appendix *post*).

This Court has jurisdiction under 28 U.S.C. Section 1257 (3) because rights, privileges and immunities of petitioners have been, and here are, set up and claimed as having been denied in violation of the 5th and 14th Amendments to the Constitution of the United States (Appendix).

The instant constitutional question was raised for the first time on a Petition for Rehearing, since it was created by an unexpected decision of the State Supreme Court, giving petitioners no prior opportunity to anticipate or assert the particular federal question, and the Petition for Rehearing constituted their first and only chance to present the matter to the Court. *Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U. S. 673, 677-8; *Great Northern R. Co.* v. *Sunburst Oil Co.,* 287 U. S. 358, 366-7; *Ohio, ex rel. Bryant* v. *Akron Park District,* 281 U. S. 74, 79; *Missouri, ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U. S. 313, 320; *Saunders* v. *Shaw,* 244 U. S. 317, 320.

Within due time petitioners filed a Petition for Rehearing in the *Greer* vs, *Wine* Case (R. 32), which Petition was denied by order entered on November 26, 1951 (R. 36).

In so far as they are pertinent here, the grounds alleged for the granting of said Petition and the questions presented, considered and determined adversely to petitioners by the state Supreme Court, are set forth in a Certificate of that court filed on the 21st day of December, 1951. The grounds pertinent here are as follows:

"Certificate of State Court as to Existence of Federal Questions

"On motion of appellees, J. W. Crank, et al., landowners, this Court, in addition to the orders made herein, orders certification as part of the record in this case the judgment and entry of denial of petition for rehearing and of appellees' prayer that the Court withdraw its opinion herein of October 22, 1951, and that it render a decision affirming decree after mandate issued March 7, 1951, in Cause No. 9336, after opinion and judgment of this Court rendered January 22, 1951, that in appellees' brief supporting its petition for rehearing (but not in the original appeal briefs)

the grounds stated in said petition were insisted and relied upon by said appellees, in particular the following grounds involving constitutional issues, namely:

(1) It is contended that this Court failed and refused to recognize the doctrine of the Law of the Case in rendering an opinion on the second appeal, from the decree after mandate, in violation of Article 2, Section 22, and Article 7 of the Constitution of Arkansas, and the 5th and 14th Amendments to the Constitution of the United States.

(2) It is further contended that this Court, on said second appeal, reconsidered its former opinion, in the same case and applied a rule and rendered an opinion on the second appeal which was in conflict with the opinion on the first appeal, thus depriving appellees of their property without due process of law, all in violation of the aforesaid constitutional provisions. (3) It is also urged that this Court grant a rehearing nine months after the former opinion had been rendered and after the lapse of the 15 juridical days prescribed in Rule 25 of this Court, in violation of the aforesaid constitutional provisions; that this reconsideration occurred after mandate had been issued and decree of the lower court had been entered thereon, all in violation, as it is said, of the aforesaid constitutional provisions. (4) It is further asserted this Court reconsidered said former opinion after the same had become final under Arkansas Statutes (1947) Section 27-2142, and after the Court had lost jurisdiction over the aforesaid Cause No. 9336, all in violation of the aforesaid constitutional provisions. * * * That in the petition and brief on rehearing it was urged that it became material to the determination of said case in this Court to determine the questions so made by appellees, which were determined adversely to appellees, as appears by the denial by this Court of appellees' Petition for Rehearing.

It is hereby certified that this Court is the highest court in the State of Arkansas in which a decision of this case could be had.

[S.] GRIFFIN SMITH,
Chief Justice.

Dec. 21, 1951."

Question Presented

Whether the state Supreme Court, in reconsidering its first opinion nine months after the time for rehearing allowed by its Rule 25 (Appendix) had expired and after mandate had been issued and decree of the Chancery Court had been entered thereon and after said opinion had become final under Arkansas Statutes (1947), section 27-2142 (Appendix) and after the Court had lost jurisdiction over the cause in which the opinion was rendered, and in rendering an opinion on the second appeal which contained rulings and directions to the lower court which were squarely in conflict with those announced in the former opinion—in other words, whether this denial to petitioners of their rights, privileges and immunities under said Rule 25 was in violation of the 5th and 14th Amendments to the Constitution of the United States, in that, by the repudiation of the first opinion after time for rehearing, reconsideration and modification had expired, petitioners will be denied the aforesaid rights, privileges and immunities without due process of law, and will be denied the equal protection of the laws, and will be deprived of their property without due process of law.

Statutes, Constitutional Amendments and Rules of Court Involved

The pertinent Amendments to the Constitution of the United States, statutory provisions, and Rules of Court are printed in the Appendix annexed hereto.

Statement

Respondents herein brought suit in the Chancery Court of Miller County, Arkansas, wherein they sought to recover the amount alleged to be due them on bonds and coupons of the McKinney Bayou Drainage District and prayed said court to enter a decree ordering the Receiver of the District to apply to the County Court for an order levying an additional tax on the assessment of benefits sufficient to cover the amount of the outstanding bonds and coupons.

Thereafter the Chancery Court dismissed the complaint, holding that the County Court's power to tax had been exhausted.

On appeal, the Supreme Court of Arkansas found that there was still unexhausted 6.65 per centum of the total assessed benefits of $1,028,425 and directed the Chancery Court to enter a decree directing the Receiver of the District to apply to the County Court for an order levying an additional tax upon said 6.65% of the assessment of benefits "with some interest thereon" (R. 14-15).

No petition for rehearing was filed by any party to the cause, and, after lapse of the 15 judicial days allowed by Rule 25 for the filing of such petitions (Appendix), mandate was issued (R. 21) and a decree after mandate was entered (R. 27).

Appeal was prayed from said decree on the ground that it did not conform to the opinion and order of the Supreme Court. On October 22, 1951, said Court rendered its opinion on this second appeal (R. 30) wherein the court said (R. 31): "Reversed, with directions to enter a decree that payments aggregating 93.35% were interest, and that the benefits have not been reached." In its decree (R. 29), the Supreme Court found: "The court erred in failing to hold that payments in an amount equal to 93.35% of the assessed benefits were to be credited on statutory interest," and

ordered the Chancery Court to take further proceeding "not inconsistent with the opinion herein delivered."

A Petition for rehearing was in due time filed by the Receiver and by the Landowners, which petition was denied on November 26, 1951 (R. 36). On December 8, 1951, the Landowners moved the Court to certify the federal constitutional questions presented by said petition for rehearing and the Court's consideration and action thereon. On December 21, 1951, the said Court filed its certification so moved (R. 36).

Specification of Errors to Be Urged

The Supreme Court of Arkansas erred:

1. In reconsidering, after expiration of the time allowed for rehearing by Rule 25 and after the judgment of the Court had become final and mandate had been issued and decree entered thereon, its opinion in appeal case *Greer* v. *Wine*, No. 9565, which opinion and the order and direction therein are squarely in conflict with the former opinion and direction of the Court, in violation of the 5th and 14th Amendments to the Constitution of the United States.

2. In rendering a second opinion which was not confined solely to the question whether the decree after mandate conformed to the original opinion.

3. In denying the Landowners' petition for a rehearing.

Reasons for Granting the Writ and Argument

1. Clearly, the question presented is of signal importance in the administration of justice and is plainly in the public interest. It is assumed that most, if not all, highest state courts have prescribed rules limiting the time within which petitions for rehearing must be filed, and the effect of the precedent here set for allowing a reconsideration and modification of an opinion, after the mandatory law day for

filing petitions for rehearing, will be far reaching and, if upheld, will become a noxious innovation on established practice and tend to break down the sanctity of published Rules of Court.

The rules are mandatory and have the force of statutes, and a denial of the rights, privileges and immunities vouchsafed by such rules may not be denied to litigants in a particular case. Such a denial would be without due process and the equal protection of the laws.

Arkansas Statutes (1947) Sec. 27-2142 empowers the State Supreme Court to promulgate rules governing practice and procedure with respect to cases before it (Appendix). Rule 25 (formerly designated as Rule III) prescribes that petitions for rehearing *must* be filed within fifteen judicial days from date of decision (Appendix).

Rules of practice in the courts are adopted so that there may be an orderly administration of justice without undue delay in final determination of causes. *Williams* v. *State*, 27 Ala. App. 525, 175 So. 697.

In *Rio Grande Irrigation & C. Co.* v. *Gildersleeve*, 174 U. S. 603, this Court quoted with approval from *Thompson* v. *Hatch*, 3 Pick. (Mass.) 512 as follows (608): "A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of a particular case. . . . The courts may rescind or repeal their rules without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it."

The rule of *Thompson* v. *Hatch*, 3 Pick. (Mass.) 512 "was declared many years ago" and "that statement of the law has uniformly been followed." *Hillsdale Grocery Co.* v. *Union & People's Nat. Bank*, 6 F. S. 773 (DC Mich.)

A rule of court has the force and effect of a mandatory statute. *Horland* v. *Cook*, 63 S. D. 118, 257 N. W. 43; and see *State* v. *Presnell*, 226 N. C. 160, 36 S. F. 2d 927; *Boyer* v. *Boyer*, 129 App. Div. 647, 114 N. Y. S. 15. It must be strictly complied with. *Coddington* v. *Helbig*, 73 Atl. 454 (Md.)

A court has power to promulgate rules of procedure binding on itself. *Stepanian* v. *Asadowian*, 283 Ill. App. 495, 1 N.E. 2d 753. It binds courts as well as litigants, *Price* v. *Swartz*, 49 Ind. App. 627, 97 N.E. 938; *Clawan* v. *Whiteford*, 55 F. 2d. 1037 (App. D.C.); *Bryan* v. *State*, 94 Fla. 909, 114 So. 773; *State ex rel. Hurst* v. *Heil*, 97 N.E. 2d 634 (Ind.); *In re Knapp's Estate*, 74 Atl. 2d 217 (Me.); *Lewis* v. *Renfro*, 291 Ill. App. 396, 9 N.E. 2d 652; *Heckman* v. *Howard*, 109 Ind. App. 548, 36 N.E. 2d 957. It is mandatory on "judge, counsel and litigants", *Pentuff* v. *Park*, 195 N. C. 609, 143 S.E. 139, the same as a statute is binding, *Rooker* v. *John Hancock Mut. Life Ins. Co.*, 98 Ind. App. 478, 184 N.E. 306.

A court has no discretion to dispense with rules established by it, nor to innovate on established practice. *Bratt* v. *State Industrial Accident Comm'n*, 114 Or. 644, 236 P. 478; and see *Magnuson* v. *Billings*, 152 Ind. 177, 52 N.E. 803; *Carlile* v. *National Oil & Devel. Co.* 83 Okl. 217, 201 P. 377. Counsel disregard them at their peril. *Doyne* v. *Werner*, 48 App. D. C. 254; *Manos* v. *Fickenscher*, 62 Atl. 2d 791 (D. C. Mun. App.) They must be applied in all cases coming within them. *Davis* v. *Dunn*, 90 Vt. 253, 98 Atl. 81. They remain in force until changed or abrogated in some formal manner. *Schwing* v. *Dunlap*, 123 La. 485, 49 So. 134; *Mayberry* v. *Morse*, 43 Me. 176.

Rules must be enforced uniformly in all cases. *Pruitt* v. *Park*, 195 N.C. 609, 143 S.E. 139; *Meyer* v. *Brinsky*, 129 Ohio St. 371, 195 N.E. 702; *Kolokas* v. *Mo. Pacific Ry. Co.*, 223 Mo. 455, 122 S.W. 1082.

With respect to motions for rehearing it has been said that the court may make reasonable rules governing the right to rehearing. *Atlantic Greyhound Corp.* v. *Public Service Comm'n*, 54 S.E. 2d 169 (W. Va.). A rule relating to an application for rehearing is not repugnant to law. *Cox* v. *Shreveport Packing Co.*, 212 La. 325, 31 So. 2d 815. The Supreme Court is bound and controlled by rules in dispatching business before it, "especially in cases of petitions for rehearing". *Mann* v. *Etchells*, 132 Fla. 409, 182 So. 198.

The rules of a state Supreme Court have the effect of statutes so far as they are applicable to any case, and any violation thereof has the same effect as the violation of a statute. *Kinman* v. *Grousky*, 46 Ariz. 191, 49 P. 2d 624. In denying petitioners the rights, privileges and immunities guaranteed by Rule 25, the state Supreme Court violated what is tantamount to a statute and its action was without due process of law, denied petitioners the equal protection of the laws, and deprived them of their property without due process of law. It denied them the right and privilege of insisting upon the directions set out in the first opinion. It denied them immunity, after the expiration of the rehearing law day, from having that opinion challenged, reconsidered and repudiated. It denied them the equal protection of the law—the protection of Rule 25—as it has heretofore been applied in all cases before the state court. And, as shall be pointed out later, it deprived petitioners of their property without due process of law.

"So far, at least, as the Fourteenth Amendment is concerned, it is a restraint on the . . . judicial departments of the state." 12 American Jurisprudence p. 284. For example, it was held in *Hovey* v. *Elliott*, 167 U. S. 409 that a decree *pro confesso* entered after striking defendant's answer from the files as a punishment for his contempt in

refusing to obey an order of the court is void for want of due process of law.

"Where rights are acquired by a citizen under existing law, there is no power in any branch of the government to take them away except by due process of law." 12 American Jurisprudence p. 284, citing *Rowan* v. *State*, 30 Wis. 129, 11 Am. Rep. 559.

"Judicial proceedings are governed by the requirement of due 'process of law'." *People* v. *Belcastro*, 356 Ill. 144, 190 N.E. 301, 92 A.L.R. 1223.

"The courts may not through judicial decrees or judgments, violate the due process or equal protection clause." *Ladner* v. *Seigel*, 298 Pa. 487, 148 Atl. 699, 68 A.L.R. 1172.

In *Chicago, B & Q R. Co.* v. *Chicago*, 166 U. S. 226, this Court said (231): "It is not, therefore, important that the defendant neither filed nor offered to file an answer specifically setting up or claiming a right under the Constitution of the United States. It is sufficient if it appears from the record that such right was specifically set up or claimed in the state court in such manner as to bring it to the attention of that court. Now the right in question was distinctly asserted by the defendant in its written motion to set aside the verdict and grant a new trial . . . When the trial court overruled the motion for a new trial and entered judgment it necessarily held adversely to these claims of Federal right. . . . Those claims went to the very foundation of the whole proceeding so far as it related to the railroad company, and the legal effect of the judgment of the supreme court of the state was to deny them. . . . There is, we conceive, no room to doubt that the legal effect of the judgment below was to declare that the rights asserted by the defendant under the national constitution were not infringed by the proceedings in the case. Consequently, the motion to dismiss for want of jurisdiction must be overruled."

The *Wetmore* v. *Karrick*, 205 U. S. 141, this Court said (150): "In the second plea it is averred, and admitted by the demurrer, that under the rules of court the dismissal became final on the first Monday of July, 1899; that is, the first Monday of the following month. We think this rule day equivalent to the end of the term. It is the time at which, by the rules of court adopted under statutory power, the judgment became final, unless set aside for mistake within the principles to be hereinafter discussed." (160): "To sanction a proceeding rendering a new judgment without notice at a subsequent term, and hold that it is a judgment rendered with jurisdiction and binding when set up elsewhere, would be to violate the fundamental principles of due process of law as we understand them, and do violence to that requirement of every system of enlightened jurisprudence which judges after it hears, and condemns only after a party has had an opportunity to present his defense."

In rehearing the cause on the second appeal, in cause No. 9565, after the time allowed for rehearing had passed, and in overruling the Landowners' petition for rehearing in said case No. 9565, and holding in effect that the court had power to reconsider and modify its first opinion after the time for rehearing had expired, despite the mandatory provisions of Rule 25, and thereby to deprive petitioners of the rights, privileges and immunities guaranteed by such rule and to deny them the equal protection of the laws and to deprive them of their property without due process of law, the Supreme Court of Arkansas decided federal questions of substance in a way not in accord with applicable decisions of this Court heretofore reviewed. Rule 38 (5) of this Court. (Appendix.)

2. Another reason why the Landowners believe that a review of this case is important in the interest of justice is

the large amount of money involved and the fact that the direction in the second opinion will deprive them of their property without due process of law.

The respondents filed suit to recover $308,152.08 (R. 4) alleged to be due on unpaid bonds and coupons. Toward the discharge thereof, the lower court, in its first opinion, directed the collection of a tax on the unexhausted benefits, namely 6.65% of the total adjusted assessment of benefits, $1,028,425 (R. 1). This amounts to $68,390.26. Since no rehearing was petitioned within the 15 judicial days, this direction could not lawfully have been reconsidered or thereafter modified. But nine months after the power of reconsideration had elapsed, the court, in its second opinion, ruled in effect that the *entire* assessed benefits were subject to taxation (R. 32). In consequence, since the benefits of $1,028,4[illegible] are subject to taxation in amount sufficient to cover the alleged indebtedness of $308,152.08, the Landowners, if the second opinion is allowed to stand, will find the lien upon their lands increased from $68,390 to $308,152. Thus a lien of $239,762 in excess of the lien created by the first opinion is imposed upon the Landowners. Since this modification of the first opinion was in violation of Rule 25 and beyond the power of the court to make, petitioners contend that the imposition of this excessive lien of $239,762 results in the taking of their property without due process of law and is in violation of the 5th and 14th Amendments to the Constitution of the United States. (Appendix.)

3. It is further submitted, as a persuasive factor of the importance of this case, that the rights of a large number of Landowners are involved. The aforesaid additional tax lien of $239,762 is spread over 31,893 acres of land owned by numerous landowners (R. 1).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

NED STEWART,
Counsel for J. W. Crank and other Landowners of McKinney Bayou Drainage District,

OTTO ATCHLEY,
ROBERT S. VANCE,
Counsel for Landowner Texas & Pacific Railway Company.

BEN SHAVER,
PAUL JONES,
Of Counsel.

January 1952.

APPENDIX

Amendments to the Constitution of the United States:
Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment: "No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes:

28 U.S.C. Section 1257 (3): "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari, where . . . any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."

Arkansas Statutes (1947) Section 27-2142:

"Rules of Supreme Court—Time decisions become final —Rehearing. The Supreme Court may make rules for the convenient dispatch of business, the preservation of order, the argument of cases, or motions, the manner and time of presenting motions or petitions for rehearing, the time of issuing its mandates and decisions and modes of enforcing its mandates and orders, and may change the same. Provided, no mandate shall issue or decision become final until after fifteen (15) judicial days from the time the decision was rendered, unless the court, for good cause shown, shall otherwise direct. If a petition for rehearing be filed before the time for the decision to become final, as above specified all proceedings upon the decision and mandate therein shall be suspended until petition for rehearing shall be acted upon by the Court. Provided, the court in term time, or a judge thereof in vacation, may enlarge the time for filing petitions for

rehearing, not exceeding thirty (30) additional days, and order that all proceedings upon the decision be stayed during such time. But the party applying for an extension or enlargement of the time for filing a petition for rehearing must do so within fifteen (15) judicial days from the time the decision was rendered and show good cause for such enlargement and reasonable notice of the application must first be given the opposite party or his attorney of record. Any order for an extension of time made by a judge of the court shall be subject to the order of the court. (Civil Code, Sec. 883; Acts 1913, No. 62, Sec. 1, P. 190; C. & M. Dig., Sec. 2171; Pope's Dig., Sec. 2777.)"

Rules of Court:

Rule 38 (5) of the Supreme Court of the United States:

"5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance in a way probably not in accord with applicable decisions of this court . . ."

Rule 25 of the Rules of the Supreme Court of Arkansas (1945): "Petitions for Rehearing. (a) Time limited for Filing—Service.—Petitions for rehearing, briefs thereon, and evidence of service both of petition and brief, must be filed within fifteen judicial days (17 calendar days) from date of decision . . . (c) Additional time.—Neither party will be granted further time than as above indicated, except on showing of illness of counsel, or other unavoidable casualty."

FILED
MAR - 8 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 571

J. W. CRANK, ET AL., *Petitioners*

vs.

J. RIPLEY GREER, TRUSTEE, ET AL., *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

A. F. TRIPLETT

A. F. HOUSE

Counsel for Respondents

ARKANSAS PRINTING CO., LITTLE ROCK

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STATEMENT

McKinney Bayou Drainage District was created under the Drainage Laws of Arkansas by order of the Miller County Court on May 4, 1923. (Arkansas Statutes (1947), Sections 21-501 to 21-582.) The commissioners assessed benefits amounting to $1,045,246 against the lands within the boundaries of the District (R.1). Section 21-541, Ark. Stats. (1947), then in force, provides that

> "the property owner shall have the right to pay the assessment against his property in full within sixty days after the formation of the district, but if he does not avail himself of the privilege, the assessment of benefits shall bear interest at 6 per cent per annum and shall be payable only in installments as levied".

It is further provided that

> "the interest need not be computed until necessary to be sure the collections have not exceeded the total

> amount of benefits and interest, or the interest may be first collected".

The commissioners, on January 14, 1924, issued bonds in the amount of $450,000. The resolution which they adopted in connection with the sale of the district's bonds provides:

> "Said collections to be credited first upon the interest accruing upon said levy of the assessment of benefits" (R.10).

An order was then entered in the Miller County Court levying a tax in the amount of $943,274.75 (R.2). The total tax was made up of the following items: Bonds in the amount of $450,000 payable over a period of twenty-five years; interest at 5½ per cent, the rate specified in the bonds, amounting to $407,522; and 10 per cent for contingencies.

The funds derived from the sale of the bonds were used in constructing the contemplated improvements. There has never been any question whatever as to the validity of the bonds or the proper application of the bond funds.

In 1928 a receiver was appointed for the District by order of the Miller Chancery Court and he and his successor have since been in charge. The receiver and his counsel have been paid in excess of $80,000 and $28,000 has been expended in maintaince work. Taxes were collected against some of the lands for twenty-five years. A large number of tracts of land in the district forfeited for nonpayment of taxes and are now owned by the District. Other tracts forfeited and have been redeemed by the owners by surrendering bonds and interest coupons to the receiver. The District's debt, evidenced by bonds and interest coupons as of January 31, 1950, amount-

ed to $298,586.72. That total has since that date been bearing interest at 5½ per cent per annum. After the 1949 assessment had been paid, the receiver and the landowners took the position that the original tax levy had exhausted the power of the District to tax, and notified the bondholders that no additional tax could be levied.

The trustee for the bondholders then filed a petition in the receivership proceeding asking that the receiver be directed to apply to the Miller County Court for an order levying an additional tax to the end that funds might be raised to pay the District's debt. Certain landowners were named in the petition and brought in to make a defense in behalf of the class. The defenses raised by the receiver and the landowners may be found at page 5 of the Record.

In their pleadings both the receiver and the landowners alleged that the commissioners, in making the assessment of benefits, calculated interest at 6 per cent and added that to the estimated benefits to the land, and that the assessments of benefits as they appeared on the assessment roll included both the assessed benefit and the interest thereon. It was a fantastic contention.

The landowners joined in the contention that the power to tax had been exhausted but confronted with the obvious fact that the total levies amounted to only 93.35 of the face amount of the original assessment of benefits, exclusive of interest, they alleged, in the alternative, that future levies should be restricted to 6.65 of the face amount or the original assessment of benefits. That contention, however, was abandoned in the Supreme Court of Arkansas. There they stated in their briefs that such a question had become moot.

The Miller Chancery Court declined to direct the receiver to apply for another tax order, and according to its decree the only assets available for creditors were the forfeited lands and a small amount of cash then in the hands of the reeciver. The respondents appealed from that decree and the case was docketed in the Supreme Court of Arkansas as *Greer, Trustee,* v. *Blocker, Receiver,* No. 4-9336. It was decided on January 22, 1951.

The Respondents in their brief pointed to the absurdity in saying that the power to tax was exhausted because it was evident that, regardless of interest accumulations, there remained untouched 6.65 per cent of the original assessment of benefits.

The Supreme Court of Arkansas in its opinion held that no portion of the assessment figures included interest and that the assessment of $1,045,246 had been bearing interest at 6 per cent since 1924. The issues, however, were not ripe for an adjudication as to the exact amount of the District's liability or the individual liability of each separate tract of land within the District, for up to that point the Supreme Court of Arkansas had not definitely settled the formula for calculating interest on an assessment of benefits, although in a general way it had touched on the question in the case of *Richey* v. *Long Prairie Levee District,* 203 Ark. 1, 155 S.W. (2d) 582.

The respondents did not file a petition for rehearing because they were entirely satisfied with the decision of the Supreme Court of Arkansas. They had been sustained on every point presented to that Court. In March of 1951 they returned to the Miller Chancery Court and asked that an order be entered levying a tax sufficient to pay the bonds, the interest, and provide a 10 per cent cushion for contingencies. In the meantime, however, the

case of *Watson* v. *Drainage District No. 3 of Crittenden County*, 218 Ark. 361, 236 S.W. (2d) 425, had been decided by the Supreme Court of Arkansas on February 12, 1951, and there the proper formula was stated. The annual tax collections are to be applied first toward the payment of interest and the balance is then applied to principal. If the District does not levy the full 6 per cent in any one year, there is a waiver as to the difference between the rate levied and 6 per cent. If more than 6 per cent is levied, the principal of the assessment of benefits diminishes. If 6 per cent or less than 6 per cent is levied, the principal amount of the assessment of benefits remains intact. Applying that decision to the tax levies made by McKinney Bayou Drainage District, it appeared that the original assessment of $1,045,246 was intact and would continue to bear interest at 6 per cent. This, of course, would guarantee the full payment of the bonds and coupons. Consequently, the respondents asked the Miller Chancery Court to levy a substantial tax payable in installments. Then for the first time, respondents learned that petitioners were taking the position that under the decision of the Supreme Court of Arkansas any future levy would be limited to 6.65 per cent of the original assessment of benefits.

The Miller Chancery Court sustained that theory, and the respondents again appealed to the Supreme Court sus- the respondents again appealed to the Supreme Court of Arkansas. On the second appeal petitioners argued that in the original opinion it had unequivocally been held that 6.65 per cent of the original assessment was the limit for future levies and they pleaded "law of the case." Respondents argued that "law of the case" was not applicable because the original opinion, when properly interpreted, would not justify such a contention; that to construe the opinion as limiting future

levies to 6.65 per cent of the original assessment of benefits would nullify the vital holding that the original assessment of benefits had been bearing interest at 6 per cent since 1924.

The Supreme Court of Arkansas, in the opinion it rendered on October 22, 1951 (R.30), confirmed respondents' interpretation of the original opinion.

ARGUMENT

I

No Proper Record Has Been Filed

Rule 38(1) of this Court provides that the petition "shall be accompanied by a certified transcript of the record in the case". The record before the Supreme Court of Arkansas was a combination of two records: that pertaining to the first appeal, and that pertaining to the second appeal. On the second appeal in the same case it is not necessary to refile the record on the first appeal, for the court will treat it just as if it had been refiled with that part of the record pertaining to the second appeal. Rule 16(f) of the Supreme Court of Arkansas reads as follows:

> "When a cause has once been before this court and a transcript is again called for (for the purpose of correcting an error which occurred on retrial), the second transcript shall begin where the former ended—that is, with the judgment of this Court, which should be entered of record in the Circuit Court, omitting the opinion of the appellate court. The appeal or supersedeas bond should be the last paper copied."

That rule was followed in perfecting the second appeal to the Supreme Court of Arkansas. That part of the record which was developed on the first appeal was of vital importance to the Supreme Court of Arkansas in providing a background for the interpretation of its first opinion. Counsel have filed here a transcript which includes no part of the record on the first appeal. It includes only the copy of the court's opinion on the first appeal and the

subsequent proceedings. It is a transcript of only a part of the record. It puts upon this Court the burden of determining whether an opinion of the Supreme Court of Arkansas violates constitutional requirements and without supplying it with the record on which the opinion was based.

The phrase, "transcript of the record" can only mean the entire record pertaining to the issue presented.

II

No Federal Question Was Properly Raised

The Receiver, in his brief on the second appeal, argued that the trial court had correctly interpreted the opinion of the Supreme Court of Arkansas. The landowners made the same contention and also argued that "law of the case" controlled and that "right or wrong" certain language in the first opinion was conclusive. Nowhere did they refer to Rule 25 of the Supreme Court of Arkansas, or say that any provision of the Federal Constitution would be violated by a reversal. No rule of court and no case ever decided by the Supreme Court of Arkansas furnished any basis for petitioner's prediction that the appellate court would have to affirm the decree of the lower court. In the absence of any precedent which might have misled them, they pushed ahead without the slightest precaution with respect to the raising of constitutional objections. Disappointed by the second decision, they, for the first, time mentioned Rule 25 and the Federal claim in their Petition for Rehearing, which was overruled without comment (R.36).

There is no good reason why they could not have raised in the original hearing all of the issues which were

presented in the Petition for Rehearing, and there is nothing whatever in the situation which will excuse them for having failed to do so.

III

No Federal Question of Substance is Involved

This Court will not upset an interpretation which the Supreme Court of Arkansas has given to its own opinions. To do so would involve this Court in local procedural matters which traditionally have been left to the State courts.

Petitioners refer to Rule 25 of the Supreme Court of Arkansas, but violation of that rule could not possibly have occurred because respondents did not file any Petition for Rehearing. The Supreme Court of Arkansas has no rule which provides that in the same case an earlier decision cannot be overruled by a later one. Petitioners, in the last analysis, are saying that a Federal right was impaired because the Supreme Court of Arkansas declined to agree with their interpretation of the first opinion and their conception of "law of the case".

"Law of the case," like many other procedural rules, is not inflexible. In 5 *Corpus Juris, Secundum,* at page 1277, the author says:

> "The rule is qualified, however, in a number of jurisdictions which hold that, although the court will not review or reconsider questions decided on a former appeal except in most unusual circumstances or in a very clear case of error, the court is not precluded from doing so, and the former decision may be reconsidered and reversed under exceptional circumstances and when cogent reasons therefor exist. For example, the appellate court will overrule or modify its former decision where the decision is palpably erroneous or grossly and

> manifestly unjust, or where the mischief to be cured far outweighs any injury that may be done in the particular case, especially when no rights have accrued in reliance upon the former decision, and where the appellate court has rendered an inconsistent decision in the meantime."

The scope and effect of a State court's judgment involves no Federal question. *Kenney* v. *Craven,* 215 U.S. 125. A State court's construction of a State statute will not be disturbed. *Oklahoma Tax Commission* v. *Texas Co.,* 336 U.S. 342. Insofar as State law is concerned, the judgment of the Supreme Court of Arkansas is binding on this Court. *Williams* v. *Kaiser,* 323 U.S. 471. It is not the function of this Court to decide local questions, and it will accept the State court's judgment that a certain procedure satisfied all State requirements. *United Gas Public Service Co.* v. *State of Texas,* 303 U.S. 123. State courts have supreme power to interpret written and unwritten laws of the State. *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill,* 281 U.S. 673; *American Railway Express Co.* v. *Commonwealth of Kentucky,* 273 U.S. 269. A decision of a State court cannot be questioned under the Fourteenth Amendment because the decision is asserted to be wrong and contrary to previous decisions of the same court. *Patterson* v. *Colorado,* 205 U.S. 454. A decision of a State court on a matter of pleading or practice is not reviewable by this Court. *Central Vermont Railway Co.* v. *White,* 238 U.S. 507.

CONCLUSION

The Petition should be denied.

A. F. TRIPLETT
A. F. HOUSE
Counsel for Respondents